

NORTH NEGROS SUGAR CO., INC., PLAINTIFF AND APPELLANT, VS. SERAFIN HIDALGO, DEFENDANT AND APPELLEE.

G. R. No. 42334. October 31, 1936

Ponente: RECTO, J.

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RECTO, J.:

On October 12, 1933, the plaintiff filed before the Court of First Instance of Occidental Negros a complaint praying, upon the allegations contained therein, that an injunction be issued, restraining the defendant from entering or passing through the properties of the plaintiff, specially through the "mill site" of plaintiff's sugar central.

It appears that the plaintiff is the owner of a site in which is located its sugar central, with its factory building and residence for its employees and laborers, known as the "mill site.*" It also owns the adjoining sugar plantation known as Hacienda "Begofia." Across its properties the plaintiff constructed a road connecting the "mill site" with the provincial highway. Through this road plaintiff allowed and still allows vehicles to pass upon payment of a toll charge of P0.15 for each truck or automobile. Pedestrians are allowed free passage through it.

Immediately adjoining the above-mentioned "mill site" of the plaintiff is the hacienda of Luciano Aguirre, known as Hacienda "Sangay," where the defendant has a billiard hall and a tuba saloon. Like other people in and about the place, defendant used to pass through the said road of the plaintiff, because it was his only means of access to the Hacienda "Sangay" where he runs his billiard hall and tuba saloon. Later on, by order of the plaintiff, every time that the defendant passed driving his automobile with a cargo of tuba plaintiff's gatekeeper would stop him and prevent him from passing through said road. Defendant in such cases merely deviated from said road and continued on his way to the Hacienda "Sangay" across the fields of Hacienda "Begona," likewise belonging to the plaintiff.

The alleged conveyance of tuba to plaintiff's "mill site" or the sale thereof within its property has not been established by the evidence adduced in this case. This the plaintiff admits in its brief (p. 15). Neither is there any evidence to show that the defendant actually created disturbance in plaintiff's properties, including its "mill site."

Other pertinent facts will be stated in appropriate places in this decision.

A. First of all it may be stated that in the case at bar the injunction applied for, constitutes, unlike the auxiliary and subordinate remedy that it ordinarily is, the principal remedy itself. The relief should only be granted, therefore, after it has been established not only that the right sought to be protected exists, but also that the acts against which the injunction is to be directed are violative of said right.

"SEC. 164. Circumstances under which a preliminary injunction may be granted. A preliminary injunction may be granted when it is established, in the manner herein-after provided, to the satisfaction of the judge granting it:

- That the plaintiff is entitled to the relief demanded and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of either for a limited period or perpetually;

- That the commission or continuance of some act complained of during the litigation would probably work injustice to the plaintiff;

- That the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act probably in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual." (Code of Civil Procedure.)

"In order that, at the final trial of a case, an injunction may issue perpetually prohibiting the repetition or continuation of an act complained of, it is indispensable that it shall have been proven at trial that he who seeks such a remedy is entitled to ask for it; if he is not, his request must be denied." (Tumacder vs. Nueva, 16 Phil., 513.)

"The extraordinary remedy of injunction will not be granted to prevent or remove a nuisance unless there is a strong case of pressing necessity, and not because of a trifling discomfort." (De Ayala vs. Barretto, 33 Phil., 538.)

"The existence of a right violated is a prerequisite to the granting of an injunction. * * * A permanent injunction should not be awarded except in a clear case and to prevent irreparable injury." (32 C. J., 34-36.)

"A court of chancery will not entertain a bill to enforce a mere valueless abstract right, and the court will, on its own motion, raise the point for its own protection." (Dunnom vs. Thomsen, 58 111. App., 390.)

None of these requisites is present in the instant case. There has been a failure to establish either the existence of a clear and positive right of the plaintiff specially calling for judicial protection through an extraordinary writ of the kind applied for, or that the defendant has committed or attempts to commit any act which has endangered or tends to endanger the existence of said right, or has injured or threatens to injure the same.

In obtaining ex-parte a preliminary injunction in the lower court, the plaintiff made under oath in its complaint the following allegations, which later turned out to be untrue, or, at least, beyond the capacity of plaintiff to prove:

"3. That on sundry occasions heretofore, the defendant used to go to the said 'mill site' of the plaintiff, passing over the latter's private roads, and there caused trouble among the peaceful people of the place.

"4. That the plaintiff, through its representatives, has prohibited the defendant from entering its private property, but this notwithstanding, the defendant still persists in repeating his incursions into the said private roads and 'mill site' of the plaintiff, disturbing public order and molesting plaintiff's employees and their families.

The court, in its order granting the preliminary injunction, said:

"Considering the said complaint and the sworn statement of its correctness filed by plaintiff's attorneys[1] and it appearing satisfactorily that the issuance of a preliminary injunction is in order because of the sufficiency of the grounds alleged, upon the filing of a bond, it is hereby, etc. "

After obtaining the preliminary injunction, the plaintiff amended its complaint by eliminating therefrom those very allegations upon which the court granted the temporary remedy, namely, the acts imputed to the defendant "of causing trouble among the peaceful people of plaintiff's 'mill site' and of disturbing public order and molesting plaintiff's employees and their families within the private roads and the 'mill site' of the plaintiff." The plaintiff doubtless overlooked the fact that the allegation it availed of to obtain a preliminary injunction was necessary to secure one of a permanent character. In its new complaint, its only grievance is that the defendant insists in passing through its property to take tuba to the Hacienda "Sangay" (which does not belong to the plaintiff but to Luciano Aguirre, and where the defendant has established a legitimate business). The amended complaint no longer alleges

It develops, however, that neither the original complaint nor the one amended states how and why the mere passage of the defendant over plaintiff's estate to convey tuba to the Hacienda "Sangay" has caused damages to plaintiff's property rights, requiring the unusual intervention and prohibition thereof by the courts through injunctive relief. The plaintiff failed not only to make any allegation to this effect, but also to state that the road on its property where the defendant used to pass on his way to the Hacienda "Sangay" was open to the public in general, and that the plaintiff, exercising without any permit a power exclusively lodged in the state by reason of its sovereign capacity, required the payment of passage fees for the use of said road.

Now, there being no contention here that the defendant, in passing over plaintiff's estate to take tuba to the Hacienda "Sangay," occasioned damages to such estate, or that he sold tuba within the confines thereof, what could have been the basis of plaintiff's right for which the special protection of the court is invoked, and of the illegal act laid at defendant's door? Defendant's passage over plaintiff's property does not, of itself, constitute an unlawful act inasmuch as the plaintiff, of its own accord, opened the same to the public conditioned only upon the payment of transit fees by motor vehicles. Neither does the mere transportation of tuba over plaintiff's estate amount to a violation of the latter's property rights, unless the goods' destination be at any point within the confines thereof, or unless the said goods be sold in transit to the laborers and employees of the plaintiff, which, as plaintiff itself admits in its brief (p. 15), has not been shown.

The deduction from plaintiff's evidence is, that the real damage which it seeks to avoid does not consist in defendant's taking tuba with him while traversing the former's property, as there is no causal relation between the act and any resultant damage, but in the fact that tuba is disposed of at the Hacienda "Sangay" to which plaintiff's laborers have access. What should, therefore, be enjoined, if it were legally possible, is defendant's sale of tuba at the Hacienda "Sangay," and not its conveyance across plaintiff's estate. But if, as plaintiff concedes (brief, p. 16), the former cannot be legally enjoined, least of all can the latter be restrained as long as the public in general is free to go about the said property and it has not been shown that the defendant, in passing through it, has occasioned damage thereto or has committed any act infringing plaintiff's property rights or has refused to pay the required road toll.

Defendant's sale of tuba at the Hacienda "Sangay" is nothing more than the exercise of a legitimate business, and no real damage to third persons can arise from it as a natural and logical consequence. The bare possibility that plaintiff's laborers, due to the contiguity of the Hacienda "Sangay" to its property, might come to defendant's store to imbibe tuba to drunkenness, does not warrant the conclusion that the defendant, in thus running the business, impinges upon plaintiff's property rights and should thereby be judicially enjoined. The damage which plaintiff seeks to enjoin by this action does not consist, as has been demonstrated, in defendant's maintaining a tuba store at the Hacienda "Sangay," or in defendant's crossing its property while taking tuba to the Hacienda "Sangay," but in its laborers finding their way to the said hacienda in order to buy tuba and become drunk. In other words, the act sought to be restrained as injurious or prejudicial to plaintiff's interests, is that committed, not by the defendant, but by plaintiff's own laborers. Rightly and logically, the injunction should be directed against said laborers to the end that they should abstain from going to the Hacienda "Sangay" in order to buy tuba and become drunk. As it would seem unusual for the plaintiff to do this, it should at least exercise stricter vigilance and impose rigorous discipline on its laborers by, for instance, punishing drunkenness with expulsion. Plaintiff's remedy lies in its own hands and should not be looked for in the courts at the sacrifice of other interests no less sacred and legitimate than the plaintiff's.

Where one has a right to do a thing equity has no power to restrain him from doing it. (*Dammann vs. Hydraulic Clutch Co.*, 187 Pac, 1069.) Acts under the authority of the law will not be enjoined (*Bonaparte vs. Camden, etc. Railroad Co.*, 3 Fed. Cas. No. 1617, Baldw., 205). Lawful exercise of rights incidentally injuring others may not

be enjoined by injunction. (14 R. C. L., 369.) "It is * * * an established principle that one may not be enjoined from doing lawful acts to protect and enforce his rights of property or of person, * * *." (14 R. C. L., pp. 365, 366.)

It is said that the plaintiff seeks to enjoin the defendant, not from selling tuba at his store in the Hacienda "Sangay," but from passing through its property to introduce tuba to said hacienda (plaintiff's brief, p. 16). The legal rule, however, is that what the law does not authorize to be done directly, cannot be done indirectly. If the plaintiff cannot judicially enjoin the defendant from selling tuba at the Hacienda "Sangay," neither can it obtain said injunction to prevent him from passing over its property to transport tuba to that place as long as the defendant is ready to pay the transit fees required by the plaintiff and does not sell the said goods inside the said property.

Suppose that the defendant, instead of being a tuba vendor, is a social propagandist whose preachings, while not subversive of the established legal order, are not acceptable to some capitalistic organizations, say the plaintiff. Suppose that the defendant, armed with the corresponding official permit, should desire to go to the Hacienda "Sangay" through plaintiff's estate for the purpose of explaining to the laborers the advantage of the latter organizing themselves into unions, or joining existing ones, to better defend their interests. Plaintiff learns in time of the plan and determines to frustrate it in the belief that it would be prejudicial to its interests for the laborers to be "unionized," while it is for its good that the laborers be contracted under the so-called "open shop" system. Unable to stop the holding of the meeting because the same is not to take place on its property, may the plaintiff secure an injunction from the courts to prevent the defendant to pass through the said property in order to reach the place of the meeting, by alleging that the defendant entertains theories of social reform which might poison the minds of the laborers at the expense of the plaintiff's interests? May the latter, under the same hypothesis, maintain that defendant's act in passing through its property, which is open to public use, constitute trespass or usurpation restrainable by injunction? If the answer to these questions is, as it must be, in the negative, the present case is not susceptible of a different solution. The only difference between the two cases is that in the one supposed the dreaded damage to plaintiff's interests is of more moment and of more lasting effect than that in the case at bar.

When a private road has been thrown open to public use, no action for trespass is maintainable against any person who desires to make use thereof; consequently, an injunction suit likewise does not lie.

"Private roads, except where laid out under constitutional provisions authorizing the condemnation of private property for a private use, are public roads in the sense that they are open to all who see fit to use them, and it is immaterial that the road is subject to gates and bars, or that it is merely a cul de sac. Being thus considered as a public road, it necessarily follows that the owner of the land through which the road is laid out cannot maintain an action of trespass against any person using it; * * * " (50 C. J., pp. 397, 398.)

"* * * Where it is clear that the complainant does not have the right that he claims, he is not entitled to an injunction, either temporary or perpetual, to prevent a violation of such supposed right. * * * An injunction will not issue to protect a right not in esse and which may never arise or to restrain an act which does not give rise to a cause of action, * * *." (32 C. J., pp. 34, 35.)

B. "In its brief, plaintiff states:

"In transporting the tuba which he sells in his saloon in Hacienda 'Sangay' the defendant used to pass thru the private road of the plaintiff which connects its sugar central with the provincial road. On this private road the plaintiff has put up a gate under the charge of a keeper, and every time that the defendant passed with a cargo of tuba the gatekeeper would stop him and remind him that tuba was not permitted entry into the private

properties of the company, but instead of heeding this prohibition the defendant would simply deviate from the road and continue on his way to hacienda 'Sangay' by way of the fields of Hacienda 'Begona,' which is also the private property of the plaintiff."

It is deducible from the above statement that, whenever the gatekeeper of the plaintiff prevented the defendant from passing thru its so-called "private road," on his way from the provincial road to the Hacienda "Sangay," the defendant deviated from said road and carried the tuba across the lands of the Hacienda "Begona" leading to the Hacienda "Sangay." The evidence discloses that this passageway across the Hacienda "Begona" is the same one frequented by carabaos (s. t., 32,36). Plaintiff intends not only to prohibit the defendant from using the road in question, but also from crossing the lands of the Hacienda "Begona," also belonging to the plaintiff, where carabaos are allowed to roam. An act so shocking to the conscience, one is reminded, could only have been perpetrated during the feudal period when human rights were unmercifully sacrificed to property rights. If an injunction should lie in the instant case, it should be in favor of the defendant and against the plaintiff, to enjoin the latter from obstructing the former to pass over the road in question to convey tuba to the Hacienda "Sangay." It is indeed strange that it is the plaintiff and not the defendant that should have applied for the remedy.

"* * * An injunction will not be granted when good conscience does not require it, where it will operate oppressively or contrary to justice, where it is not reasonable and equitable under the circumstances of the case, or where it will tend to promote, rather than to prevent, fraud and injustice. * * *" (32 C. J., p. 33.) "* * * a court of equity may interfere by injunction to restrain a party from enforcing a legal right against all equity and conscience. * * *" (14 R. C. L., pp. 365, 366, par. 66.) "* * * The comparative convenience or inconvenience of the parties from granting or withholding the injunction sought should be considered, and none should be granted if it would operate oppressively or inequitably, or contrary to the real justice of the case. This doctrine is well established. * * *" (14 R. C. L., pp. 357, 358, par. 60.)

"The power of the courts to issue injunctions should be exercised with great caution and only where the reason and necessity therefor are clearly established; and while this rule has been applied more frequently in the case of preliminary and mandatory injunctions, it applies to injunctions of all classes, and to restraining orders. * * *" (32 C. J., pp. 33, 34.)

"The writ of injunction will not be awarded in doubtful or new cases not coming within well-established principles of equity." (Bonaparte vs. Camden, etc. Railroad Co., 3 Fed. Cas. No. 1617; Hardesty vs. Taft, 87 Am. Dec, 584.)

C. Plaintiffs action is frivolous and baseless.

Plaintiff states in the sixth paragraph of its amended complaint:

"6. That, in addition, the plaintiff, in the exercise of its property rights, does not want to allow the entry of the defendant in any part of its estate above mentioned in order to avert any friction or ill-feeling against him."

The plaintiff, in petitioning the courts for an injunction to avert "friction or ill-feeling" against the defendant, invoking its sacred property rights, attempts to in-trust to them a mission at once beyond those conferred upon them by the Constitution and the laws, and Unbecoming of their dignity and decorum.

D. Plaintiff has not established the existence, real or probable, of the alleged damage against which the injunction is invoked.

As has been seen, the allegations of the amended complaint do not justify the granting of an injunction. The said allegations only state, as the basis of plaintiff's action, that the defendant insists in passing or "making incursions" on plaintiff's property to take tuba to the Hacienda "Sangay," and that the plaintiff wants to avoid "friction and

ill-feeling against him." Such allegations do not imply the existence, or probable existence, of any real damage to plaintiff's rights which should be enjoined, and do not, therefore, constitute a legal cause of action. On the other hand, what the plaintiff attempted to establish by its evidence differs from the allegations of its amended complaint. What said evidence really discloses is not, that the plaintiff had forbidden the defendant to convey tuba to the Hacienda "Sangay" through plaintiff's estate, but to introduce tuba into the central or to place tuba on its lands, or, according to Exhibit A, to trespass illegally on plaintiff's estate. The testimony of the gatekeeper Santiago Plagata and the accountant Ankerson is as follows:

"Q.

Why did you detain him?—A. Because the Central forbids the bringing of tuba to the Central.

"Q.

Why does the Central prohibit the entry of tuba— A. The Central prohibits the entry of tuba there because the laborers, generally, buy tuba, drink it and become drunk, and are unable to work, and sometimes they fight because they are drunk." (S. t., p. 5.)

"Q.

Why did you kick them?—A. Because the North Negros Sugar Co. prohibits the placing of tuba on those lands." (S. t, pp. 38, 39.)

Exhibit A, the alleged letter addressed by the plaintiff to the defendant, recites:

"Mr. SERAFIN HIDALGO, Driver of Auto, License No. 1085-1935.

"Present.

"Sir: Effective this date, you are hereby forbidden to trespass upon any of. the Company's properties under penalties of law prescribed for trespass.

"NORTH NEGROS SUGAR CO., INC.

"BY: (SGD.) Y. E. GREENFIELD

"Manager"

It will be noted that according to this letter, the defendant was enjoined by the plaintiff from passing thru its properties, whether he carried tuba or not.

Plaintiff's admission in its brief (p. 15) that it has not been established that the defendant has brought tuba to the "mill site," or has sold it within its property, is fatal to the present action charging the defendant with said acts.

E. The well-known principle of equity that "he who comes to equity must come with clean hands" bars the granting of the remedy applied for by the plaintiff.

It has been already stated that the plaintiff, to obtain a preliminary injunction in this case, alleged under oath in its original complaint facts which it knew to be false, or, at least, improbable, because it did not only eliminate them from the amended complaint which it filed after the issuance of the preliminary injunction, but it failed to substantiate them at the trial. We refer to the following allegations: "that the defendant used to go to the 'mill site' of the plaintiff passing through plaintiff's private roads and there cause trouble among the peaceful people of the place," and "that notwithstanding the prohibition of the plaintiff, the defendant insists in repeating his incursions into the said private roads and 'mill site' of the plaintiff, disturbing public order and molesting* plaintiff's employees and their families."

If said allegations were true, it is evident that plaintiff was entitled to a preliminary injunction at the commencement of the trial, and to a permanent injunction after the decision was rendered. But such is not the case, as the subsequent theory of the plaintiff, announced in its amended complaint, is not that the defendant "made incursions into the 'mill site' and private roads of the plaintiff, causing trouble, disturbing public order, and molesting plaintiff's employees and their families," but only that the defendant, to take tuba to the Hacienda "Sangay," belonging to Luciano Aguirre, insisted in passing through plaintiff's estate. From all this it follows that the plaintiff in order to obtain a preliminary injunction, trifled with the good faith of the lower court by knowingly making untrue allegations on matters important and essential to its cause of action. Consequently, it did not come to court with clean hands.

"Coming into Equity with Clean Hands.—The maxim that he who comes into equity must come with clean hands is, of course, applicable in suits to obtain relief by injunction. Injunction will be denied even though complainant shows that he has a right and would otherwise be entitled to the remedy in case it appears that he himself acted dishonestly, fraudulently or illegally in respect to the matter in which redress is sought, or where he has encouraged, invited or contributed to the injury sought to be enjoined. However, the general principle that he who comes into equity must come with clean hands applies only to plaintiff's conduct in relation to the very matter in litigation. The want of equity that will bar a right to equitable relief for coming into court with unclean hands must be so directly connected with the matter in litigation that it has affected the equitable relations of the parties arising out of the transaction in question." (32 G. J., pp. 67, 68.)

At this point, attention should be directed to other facts of the case indicative of the censurable attitude which the plaintiff has taken in connection therewith. On one occasion, the defendant drove his automobile along the road in question, accompanied by Antonio Dequina, headed for the Hacienda "Sangay." As they had tuba with them, on reaching the gate they were halted by the gatekeeper. The defendant and his companion got off the car and unloaded the tuba in order to follow the passageway across the lands of the Hacienda "Begona," through which plaintiff's carabaos passed, until they could reach "Sangay." Thereupon, one Ankerson, accountant and auditor of the plaintiff, arrived and no sooner had he laid eyes on the tuba containers than he indignantly kicked them and uttered a blasphemy to both, spilling the contents thereof. The defendant protested and asked Ankerson to indemnify him for the value of the tuba which had been wasted, to which Ankerson replied that he would make good what should be paid, and he then and there wrote and handed over a note to the defendant for presentation to plaintiff's cashier. The defendant presented the note, but this claim was not paid, and instead he was prosecuted for trespass in the justice of the peace court of Manapla under article 281 of the Revised Penal Code. So absurd and malicious was the charge that the court, in acquitting the defendant, entered the following order (Exhibit 3):

"A peaceful citizen who passes through a private road open to the public does not commit the crime of trespass. Although the prohibition to the accused to be in a private property should be manifest, if the latter is not fenced or uninhabited, the mere fact that the accused is found on the place in question, for a lawful purpose, does not constitute the crime of trespass defined and punished under article 281 of the Revised Penal Code."

The plaintiff did not stop at this; it filed the present action for injunction which, as has been seen, is nothing more than the culmination of a series of affronts which the plaintiff has perpetrated, privately averted through the courts, against the defendant.

F. The exercise of discretion by trial courts in matters injunctive should not be interfered with by appellate courts except in cases of manifest abuse. "* * * The court which is to exercise the discretion is the trial court and not the appellate court. The action of the court may be reviewed on appeal or error in case of a clear abuse of discretion, but not otherwise, and ordinarily mandamus will not lie to control such discretion." (32 C. J., sec. 11, p. 33.)

True, the rule has particular application to preliminary injunctions, but the rule should not be otherwise with respect to permanent injunctions especially where, as in this case, the trial court, after granting the preliminary injunction, set the same aside in its final decision on a careful review of the evidence.

II

It is undisputed that the road in question was constructed by the plaintiff on its own land, and that it connects the central or the "mill site" with the provincial road. We have also the admission that the plaintiff made this road accessible to the general public, regardless of class or group of persons or entities. Its use has been extended to employees and laborers of the plaintiff; and so also to all those who have a mind to pass through it, except that, in cases of motor vehicles, a passage fee of P0.15 each should be paid. There is no contention here that the defendant had refused to pay said tolls whenever he wanted to drive his car along the road in question.

We, therefore, have the case of an easement of way voluntarily constituted in favor of a community. Civil Code, articles 531 and 594 read:

"ART. 531. Easements may also be established for the benefit of one or more persons or of a community to whom the encumbered estate does not belong."

* * * * *

"ART. 594. The owner of an estate may burden it with such easements as he may deem fit, and in such manner and form as he may consider desirable, provided he does not violate the law or public order."

There is nothing in the constitution of this easement in violation of law or public order, except perhaps that the right to open roads and charge passage fees therefor is the State's by right of sovereignty and may not be taken over by a private individual without the requisite permit. This, however, would affect the right of the plaintiff to charge tolls, but not that of the defendant or of any other person to make use of the easement.

As may be seen from the language of article 594, in cases of voluntary easements, the owner is given ample liberty to establish them: "as he may deem fit, and in such manner and form as he may consider desirable." The plaintiff "considered it desirable" to open this road to the public in general, without imposing any condition save the payment of a fifteen-centavo toll by motor vehicles, and it may not now go back on this and deny the existence of an easement. Voluntary easements under article 594 are not contractual in nature; they constitute the act of the owner. If he exacts any condition, like the payment of a certain indemnity for the use of the easement, any person who is willing to pay it may make use of the easement. If the contention be made that a contract is necessary it may be stated that a contract exists from the time all those who desire to make use of the easement are disposed to pay the required indemnity.

The plaintiff contends that the easement of way is intermittent in nature and can only be acquired by virtue of a title under article 539. The defendant, however, does not lay claim to it by prescription. The title in this case consists in the fact that the plaintiff has offered the use of this road to the general public upon payment of a certain sum as passage fee in the case of motor vehicles.

The cases of Roman Catholic Archbishop of Manila vs. Roxas (22 Phil., 450), and Cuaycong vs. Benedicto (37 Phil., 781), are not controlling, as there the attempt was to establish that the right to an easement of way had been acquired by prescription. Here defendant's contention is, that while the road in question remains open to the public, he has a right to its use upon paying the passage fees required by the plaintiff. Indeed the latter may close it at its pleasure, as no period has been fixed when the easement was voluntarily constituted, but while the road is thrown open, the plaintiff may not capriciously exclude the defendant from its use.

Furthermore, plaintiff's evidence discloses the existence of a forcible right of way in favor of the owner and

occupants of the Hacienda "Sangay" under the Civil Code, article 564, because, according to said evidence, those living in the Hacienda "Sangay" have no access to the provincial road except thru the road in question. Santiago Plagata, principal witness of the plaintiff, testified thus:

"Emerging from the provincial road, the defendant has necessarily to pass through this private road where the gate of which I am the keeper is situated, and then he gets to the Central." (S. t., p. 6.)

"Q.

To go to the Hacienda 'Sangay,' is there any need to cross the 'mill site' of the Central?—A. Yes, sir.

"Q.

And the property of the Central is passed in going to the Hacienda 'Sangay'?—A. Yes, sir.

"Q.

Is there any other road?—A. I am not sure whether there is another road.

"Q.

For how long have you been a watchman there?— A. Nine years to date.

"Q.

And during that period of nine years, can you not state if there is any road which gives access to the Hacienda "Sangay"? Or the Central has necessarily to be passed?—A. I cannot say because I do not go to those places."

"Court:

"Q.

But all the others, except the defendant, who go to the Hacienda 'Sangay' necessarily pass thru the Central ?—A. They pass thru that road of the Central." (S. t., pp. 16, 17.)

The evidence for the defendant confirms this:

"Q.

To go there, thru what road did you have to pass?— A. Thru the road of the Central.

"Q.

And by this road of the Central you mean the Central 'North Negros Sugar Co., Inc.'?—A. Yes, sir.

"Q.

By this road of the Central which you mentioned, you mean the road where there is a gate, beginning from the Central until the provincial road, where the gate is for the purpose of preventing passage?—A. Yes, sir, the very one.

"Q.

And because of that gate, the Central collects certain toll?—A. Yes, sir." (S. t, pp. 20, 21.)

III

Having been devoted by the plaintiff to the use of the public in general, upon paying the passage fees required in the case of motor vehicles, the road in question is charged with a public interest, and while so devoted, the plaintiff may not establish discriminatory exceptions against any private person.

"When private property is affected with a public interest, it ceases to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest." (Lord Chief Justice Hale in his treatise "*De Portibus Maris*," quoted *wit.*: approval in *Munn vs. Illinois*, 94 U. S., 113 [1876], and in *Nebbia vs. New York*, 291 U. S., 502 [1934].)

The above language was used in the seventeenth century, when exceptions to the individualistic regime of ownership were scarcely recognized, and when the ideas on its social function may be said to be in their infancy.

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control" (*Munn vs. Illinois*, 94 U. S., 113; 24 Law. ed., 77.)

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. * * * The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community." (*Nebbia vs. New York*, 291 U. S., 502, 521, 525; 78 Law. ed., 940, 948.)

"Whenever any business or enterprise becomes so closely and intimately related to the public, or to any substantial part of a community, as to make the welfare of the public, or a substantial part thereof, dependent upon the proper conduct of such business, it becomes the subject for the exercise of the regulatory power of the state." (*Clarksburg Light & Heat Co. vs. Public Service Commission*, P. U. R. 1920A, 639; 84 W. Va., 638; 100 S. E., 551.)

"* * * If the service is dedicated to the public or some portion thereof, or to persons within a given area, then any member of the public or of the given class, or any person within the given area, may demand such service without discrimination, and the public, or so much of it as has occasion to be served, is entitled to the service of the utility as a matter of right, and not of grace. * * * A corporation becomes a public service corporation, and therefore subject to regulation as a public utility, only when and to the extent that the business of such corporation becomes devoted to a public use. * * *" (*Stoehr vs. Natatorium Co.*, 200 Pac. [Idaho], 132, quoted in 18 A. L. R., 766.)

"Tested by the rule laid down in *Munn vs. Illinois*, it may be conceded that the state has the power to make reasonable regulation of the charges for services rendered by the stock-yards company. Its stock yards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and therefore must be considered as subject to governmental regulation." (*Cotting vs. Godard*, 183 U. S., 79; 46 Law. ed., 92.)

"Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect, grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly. (Munn vs. Illinois, *supra*; Spring Valley Waterworks vs. Schottler, 110 U. S. 347; 28 L. ed., 173; 4 Sup. Ct. Rep., 48; People vs. Budd, 117 N. Y., 1, 27; 5 L. R. A., 559; 15 Am. St. Rep., 460; 22 N. E., 670; s. c. 143 U. S., 517; 36 L. ed., 247; 4 Inters. Com. Rep., 45; 12 Sup. Ct. Rep., 468; Brass vs. North Dakota, 153 U. S., 391; 38 L. ed., 757; 4 Inters. Com. Rep., 670; 14 Sup. Ct. Rep., 857; Noble State Bank vs. Haskell, 219 U.S., 104; 55 L. ed., 112; 32 L. R. A. [N. S.], 1062; 31 Sup. Ct. Rep., 186; Ann. Cas., 1912A, 487; German Alliance Ins. Co. vs. Lewis, 233 U. S., 389; 58 L. ed., 1011; L. R. A. 1915C, 1189; 34 Sup. Ct. Rep., 612; VanDyke vs. Geary, 244 U. S., 39, 47; 61 L. ed., 973, 981; 37 Sup. Ct. Rep., 483; Block vs. Hirsh, 256 U. S., 135; 65 L. ed., 865; 16 A. L. R., 165; 41 Sup. Ct. Rep., 458.)" Wolff Packing Co. vs. Court of Industrial Relations, 262 U. S., 522; 27 A. L. R., 1280, 1286.) Under the facts of the instant case, the road in question is of the nature of the so-called "turnpike road" or "toll-road." The following authorities are, therefore, in point:

"'Toll' is the price of the privilege to travel over that particular highway, and it is a quid pro quo. It rests on the principle that he who receives the toll does or has done something as an equivalent to him who pays it. Every traveler has the right to use the turnpike as any other high-way, but he must pay the toll." (City of St. Louis vs. Green, 7 Mo. App., 468, 476.)

"A toll road is a public highway, differing from ordinary public highways chiefly in this: that the cost of its construction in the first instance is borne by individuals, or by a corporation, having authority from the state to build it, and, further, in the right of the public to use the road after its completion, subject only to the payment of toll." (Virginia Canon Toll Road Co. vs. People, 45 Pac., 396, 399; 22 Colo., 429; 37 L. R. A., 711.)

"Toll roads are in & limited sense public roads, and are highways for travel, but we do not regard them as public roads in a just sense, since there is in them a private proprietary right. * * * The private right which turn-pike companies possess in their roads deprives these ways in many essential particulars of the character of public roads. It seems to us that, strictly speaking, toll roads owned by private corporation, constructed and maintained for the purpose of private gain, are not public roads, although the people have a right to freely travel them upon the payment of the toll prescribed by law. They are, of course, public, in a limited sense, but not in such a sense as are the public ways under full control of the state, for public ways, in the strict sense, are completely under legislative control. (Elliott, Roads & S., p. 5.)" (Board of Shelby County Com'rs vs. Castetter, 33 N. E., 986, 987; 7 Ind. App., 309.)

It has been suggested during the consideration of the case at bar that the only transportation companies with motor vehicles who can have an interest in passing over the said road are those which carry laborers of the central and passengers who transact business with the plaintiff, and not all public service motor vehicles with certificates of public convenience, and that the only persons who may have an interest in passing over the said road are the laborers of the plaintiff and persons who do business with it and the occupants of the 21 houses situated in the Hacienda "Sangay," and not everyone for personal convenience. But even if this were true, the plaintiff having subjected the road in question to public use, conditioned only upon the payment of a fifteen-centavo passage fees by motor vehicles, such circumstance would not affect the case at all, because what stamps a public character on a private property, like the road in question, is not the number of persons who may have an interest in its use, but the fact that all those who may desire to use it may do so upon payment of the required indemnity.

"* * * The public or private character of the enterprise does not depend, however, upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may

require it, to the extent of its capacity; and the fact that only a limited number of persons may have occasion to use it does not make of it a private undertaking if the public generally has a right to such use. * * *" (51 C. J., sec. 2, p. 5.)

"The test is, not simply how many do actually use them, but how many may have a free and unrestricted right in common to use them. If it is free and common to all citizens, then no matter whether it is or is not of great length, or whether it leads to or from a city, village or hamlet, or whether it is much or little used, it is a 'public road.' " (Heninger vs. Peery, 47 S. E., 1013, 1014; 102 Va., 896, quoting Elliott, Roads & S., sees. 11, 192.)

The circumstance that the road in question does not properly fall within the definition of a public utility provided in Act No. 3108, does not divest it of this character:

"* * * Whether or not a given business, industry, or service is a public utility does not depend upon legislative definition, but upon the nature of the business or service rendered, and an attempt to declare a company or enterprise to be a public utility, where it is inherently not such, is, by virtue of the guaranties of the federal constitution, void wherever it interferes with private rights of property or contract. So a legislature cannot by mere fiat or regulatory order convert a private business or enterprise into a public utility, and the question whether or not a particular company or service is a public utility is a judicial one, and must be determined as such by a court of competent jurisdiction; * * *." (51 C. J., sec. 3, p. 5.)

The road in question being a public utility, or, to be more exact, a private property affected with a public interest, it is not lawful to make arbitrary exceptions with respect to its use and enjoyment.

"Duty to Serve Without Discrimination.—A public utility is obligated by the nature of its business to furnish its service or commodity to the general public, or that part of the public which it has undertaken to serve, without arbitrary discrimination, and it must, to the extent of its capacity, serve all who apply, on equal terms and without distinction, so far as they are in the same class and similarly situated. Accordingly, a utility must act toward all members of the public impartially, and treat all alike; and it cannot arbitrarily select the persons for whom it will perform its service or furnish its commodity, nor refuse to one a favor or privilege it has extended to another, since the term 'public utility' precludes the idea of service which is private in its nature and is not to be obtained by the public. Such duties arise from the public nature of a utility, and statutes providing affirmatively therefor are merely declaratory of the common law." (51 C. J., sec. 16, p. 7.)

The circumstance that the plaintiff is not the holder of a franchise or of a certificate of public convenience, or that it is a company devoted principally to the manufacture of sugar and not to the business of public service, or that the state has not as yet assumed control or jurisdiction over the operation of the road in question by the plaintiff, does not preclude the idea that the said road is a public utility.

"The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state. (Munn vs. Illinois [94 U. S., 113; 24 L. ed., 77, supra])" (Nebbia vs. New York, supra.)

"The fact that a corporation may not have been given power to engage in the business of a public utility is not conclusive that it is not in fact acting as a public utility and to be treated as such." (51 C. J., p. 5.)

"The question whether or not it is such does not necessarily depend upon whether it has submitted or refused to submit to the regulatory jurisdiction of the state, nor upon whether or not the state has as yet assumed control and jurisdiction, or has failed or refused so to do." (51 C. J., p. 6.)

"The fact that a corporation does other business in addition to rendering a public service does not prevent it from being a public utility, and subject to regulation as such, as to its public business." (51 C. J., p. 6.)

"The term 'public utility' sometimes is used to mean the physical property or plant being used in the service of the

public." (51 C. J., p. 6.)

"There are * * * decisions in which the incidental service has been held to be of such a nature that it was subject to public regulation and control. (Re Commonwealth Min. & Mill. Co. [1915; Ariz.], P. U. R., 1915B, 536; Nevada, C. & O. Teleg. & Teleph. Co. vs. Red River Lumber Co. [1920; CaL], P. U. R., 1920E, 625; Sandpoint Water & Light Co. vs. Humbert Lumber Co. [1918; Idaho], P. U. R., 1918B, 535; Public Service Commission vs. Valley Mercantile Co. [1921; Mont.], P. U. R., 1921D, 803; Public Service Commission vs. J. J. Rogers Co. [1918], 184 App. Div., 705; P. U. R., 1919A, 876; 172 N. Y. Supp., 498; Wingrove vs. Public Service Commission [1914], 74 W. Va., 190; L. R. A., 1918A, 210; 81 S. E., 734; Chambers vs. Spruce Lighting Co. [1918], 81 W. Va., 714; 95 S. E. 192. See also Hoff vs. Montgomery [1916; CaL], P. U. R., 1916D, 880; Re Producers Warehouse [1919; CaL], P. U. R., 1920A, 919; Ticer vs. Phillips [1920; CaL], P. U. R., 1920E, 582; Re Ontario Invest. Co. [1921; CaL], P. U. R., 1922A, 181; Bassett vs. Francetown Water Co. [1916; N. HJ, P. U. R., 1916B, 815; Re Northern New York Power Co. [1915; N. Y., 2d Dist.], P. U. R., 1915B, 70.)" (Annotation in 18 A. L. R., 766, 767.)

The point is made that, there being no contract between the plaintiff and the public interested in the use of the road in question, it should be understood that such use has been by the mere tolerance of the plaintiff, and that said property has not been constituted into a public utility. The contention is devoid of merit.

"When private property is devoted to public use in the business of a public utility, certain reciprocal rights and duties are raised by implication of law between the utility and the public it undertakes to serve, and no contract between them is necessary to give rise thereto. * * *" (51 C. J., sec. 12, p. 6.)

Wherefore the judgment appealed from is affirmed with costs to the plaintiff.

Abad Santos, J., concurs.

[1] The sworn statement was in fact presented by the' plaintiff's manager Greenfield (p. 4, B. E.). that the defendant went to the "mill site" and to the private roads of the plaintiff "to cause trouble, disturb public order and molest plaintiff's employees and their families."

CONCURRING AND DISSENTING

LAUREL, J.:

I concur in the result. I do not, however, agree to certain conclusions and observations that are made in the foregoing opinion.

I. I am of the opinion that no servitude of way under the Civil Code has been created on the tenement of the plaintiff in favor of the defendant.

Servitudes constitute legal limitations on the right of ownership. They are considered so among the most ancient of property rights. The early Roman Law allowed the imposition of a servitude of way over intervening tenements for the purpose of enabling strangers to reach the sepulchres of their ancestors. The modern civil law, however, has amplified the principle and invested it with a utilitarian concept for the convenience of landowners, particularly for the cultivation of enclosed rural estates. But the general principles of the Roman Law regarding servitudes, whether praedial or personal, are preserved intact in the modern civil law, and are now commonly applied to the "easements" of the common law. Among these general principles which have come down to us through the ages are (1) that servitudes are to be considered subordinate to the right of ownership, and (2) that,

being a sort of dismemberment of the right of private property, servitudes are never to be presumed but must be proved to have been constituted in the manner prescribed by law.

A servitude of way is either legal or voluntary. A forced servitude of way is constituted in the manner and under the conditions stated in articles 564 to 570 of the Civil Code. Paragraph 1 of article 564 provides that "The owner of a tenement or land, surrounded by others belonging to different owners and without access to a public highway, is entitled to demand a right of way through the neighboring tenements, after payment of the proper indemnity."

No legal servitude of way exists in the present case. The defendant has not shown that his right of passage across the tenement of the plaintiff exists by reason of necessity growing out of the peculiar location of his property. He does not even own the tenement where he conducts his business. Said tenement belongs to Luciano Aguirre who, as the owner thereof, would be the one entitled to claim the forced servitude of way, on the hypothesis that it is demanded by the peculiar location of the tenement. A mere lessee can not demand the legal servitude of way (see *Manresa*, Civil Code, vol. 4, 2d ed., p. 705). Moreover, it does not appear that Luciano Aguirre or the defendant has otherwise fulfilled the requirements of the law. (Art. 564, Civil Code; *Cuaycong vs. Benedicto*, 37 Phil., 781, 797.)

Nor can it be said that a voluntary servitude of way exists. It should be observed that a right of way is discontinuous or intermittent as its use depends upon acts of man (art 532, Civil Code; 4 *Manresa*, Civil Code, 2d ed., p. 569; *Cuaycong vs. Benedicto*, supra). Lacking the element of continuity in its use, a right of way may not be acquired by prescription but solely by title (art. 539, Civil Code). Only continuous and apparent servitudes, like the servitude of light and view, may be acquired by prescription (art. 537, Civil Code). Even assuming, however, that a servitude of way may be acquired by prescription in view of the provisions of the present Code of Civil Procedure, nevertheless, it can not be held that prescription exists in the present case. The free passage over the private way rests on mere tolerance on the part of the plaintiff, and it is a settled principle of law in this jurisdiction that acts merely tolerated can not give rise to prescription (*Cortes vs. Yu-Tibo*, 2 Phil., 24, 27; *Ayala de Roxas vs. Maglonso*, 8 Phil., 745; *Roman Catholic Archbishop of Manila vs. Roxas*, 22 Phil., 450, 452, 453; *Municipality of Nueva Caceres vs. Director of Lands and Roman Catholic Bishop of Nueva Caceres*, 24 Phil., 485; *Cuaycong vs. Benedicto*, supra).

In what does the title of the plaintiff consist? By title as a mode of acquiring servitude, the Civil Code refers to the "juridical act" which gives birth to the servitude. "Son, pues, títulos constitutivos de los servidumbres cualquiera que sea su clase, la ley, la donación, el contrato y el testamento" (4 *Manresa*, Civil Code, 2d ed., pp. 594, 595). Title by law is lacking. There is neither will nor donation, for the making of a donation and the execution of a will require special formalities. It is elementary that the plaintiff, being an artificial person, has no capacity to execute a will. In my opinion, there is no title by contract. The act of the plaintiff in opening the private way here involved did not constitute an offer to the public to use said way. There being no offer, there could be no acceptance; hence, no contract.

The plaintiff did not encumber his tenement with a servitude of way. Property is always presumed free from any and all encumbrances. The act of the plaintiff, performed wholly upon its own exclusive property, should not be construed to constitute the creation of a servitude. *Servitus in faciendo consistere nequit*. "For a man should not use that which belongs to him as if it were a service only, but as his own property" (Law 13, title 31, third partida, quoted with approval in *Cartes vs. Yu-Tibo*, 2 Phil., 24, 27).

II. The mere opening of the private way in question to the public did not necessarily clothe it with a public interest such as to compel the owner thereof to allow everybody to pass thereon. Even on the hypothesis that such private way is affected with a public interest, still, it is good law that the owner thereof may make reasonable restrictions

and limitations on the use thereof by the general public.

Public regulation of private property under the police power is often justified on the ground that the property so regulated is affected with a public interest. The phrase "affected with a public interest" was brought into prominence by the discussion in Lord Hale's treatise *De Portibus Marts* (1 Hargrave's Law Tracts, 78) of more than two centuries ago where the classic statement was made that when private property "is affected with a public interest, it ceases to be *juris privati* only."

Chief Justice Taft, speaking for the Supreme Court of the United States in *Wolff Packing Co. vs. Court of Industrial Relations* (262 U. S., 522; 67 Law. ed., 1103,1108), enumerated as follows the businesses and occupations which may be said to be clothed with a public interest:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. (*State vs. Edwards*, 86 Me., 102; 25 L. R. A., 504; 41 Am. St. Rep., 528; 29 AtL, 947; *Terminal Taxi-cab Co. vs. Kutz*, 241 U. S., 252, 254; 60 Law. ed., 984, 986; P. U. R. 1916D., 972; 36 Sup. Ct. Rep., 583; Ann. Cas. 1916D, 765.)

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly. (*Munn vs. Illinois*, supra; *Spring Valley Waterworks vs. Schottler*, 110 U. S., 347; 28 Law. ed., 173; 4 Sup. Ct. Rep., 48; *People vs. Budd*, 117 N. Y., 1, 27; 5 L. R. A., 559; 15 Am. St. Rep., 460; 22 N. E., 670; s. c. 143 U. S., 517; 36 Law. ed., 247; 4 Inters. Com. Rep., 45; 12 Sup. Ct. Rep., 468; *Brass vs. North Dakota*, 153 U. S., 391; 38 Law. ed., 757; 4 Inters. Com. Rep., 670; 14 Sup. Ct. Rep., 857; *Noble State Bank vs. Haskell*, 219 U. S., 104; 55 Law. ed., 112; 32 L. R. A. [N. S.], 1062; 31 Sup. Ct. Rep., 186; Ann. Cas. 1912A, 487; *German Alliance Ins. Co. vs. Lewis*, 233 U. S., 389; 58 Law. ed., 1011; L. R. A. 1915C, 1189; 34 Sup. Ct. Rep., 612; *VanDyke vs. Geary*, 244 U. S., 39, 47; 61 Law. ed., 973, 981; 37 Sup. Ct. Rep., 483; *Block vs. Hirsh*, 256 U. S., 135; 65 Law. ed., 865; 16 A. L. R., 165; 41 Sup. Ct. Rep., 458.)

The term "affected with a public interest" is incapable of exact apprehension. "What circumstances shall affect property with a public interest is not very clear." (Cooley, *Constitutional Limitations*, 7th ed., p. 872.) "It requires no especial acuteness of mind," says Willoughby in his valuable work on the Constitution of the United States, "to see that, in truth, no clear line of distinction can be drawn." (Vol. 3, 2d ed., pp. 1758, 1759. See also *German Alliance Ins. Co. vs. Lewis*, 233 U. S., 389; 34 Sup. Ct., 612 ; 58 Law. ed., 1011; L. R. A. [1915C], 1189.)

To my mind, the road in question may not be likened unto a turnpike or toll road in the legal sense of the term. The right to construct and maintain a toll or turnpike road and to collect tolls exists only by virtue of an express grant from the legislature. (*Powell vs. Sammons and Dotes*, 31 Ala., 552; *Blood vs. Woods*, 30 P., 129; % Cal., 78; *Volcano Canon Road Co. vs. Placer County*, 26 P., 513; 88 Cal., 634; *Truckee, and Tahoe Turnpike Road Co. vs. Campbell*, 44 Cal., 89; *Virginia Canon Toll-Road Co. vs. People*, 45 P., 398; 22 Colo., 429; 37 L. R. A., 711; *Pike County Justices vs. Griffin, etc., Plank Road Co.*, 9 Ga., 475; *Wadsworth vs. Smith*, 11 Me., 278; 20 Am. D., 525; *State vs. Louisiana, etc., Gravel Road Co.*, 92 S. W., 153; 116 Mo. App., 175; *String vs. Camden, etc., Turnpike Co.*, 40 A., 774; 57 N. J. Eq., 227; *In re People*, 128 N. Y. S., 29; 70 Misc., 72; *Turner vs. Eslick*, 240 S. W., 786; 146 Tenn., 236; *Peru Turnpike Co. vs. Town of Peru*, 100 A., 679; 91 Vt., 295; L. R. A. [1917E], 559;

Ferguson vs. Board of Sup'rs of Roanoke County, 113 S. E., 860; 133 Va., 561; Rainy Lake River Corp. vs. Rainy River Lumber Co., 27 Ont. L., 151; 6 Dom. L. R., 401; 22 Ont. W. R. 952.) So that if there has been no state grant, there can be no toll or turnpike road. In the case before us, the private way has been established and is being maintained by the plaintiff, a private entity, for its own accommodation and not by virtue of a grant from the state.

But even if we were to assume that the private way of the plaintiff here is property clothed with a public interest, the only inference would be that it is subject to governmental or public regulation and control or, as some courts put it, to the regulatory power of the state, exercised for the common good (Fisher vs. Yangco Steamship Co., 31 Phil., 1; De Villata vs. Stanley, 32 Phil., 541; 51 C. J., p. 9) by the legislature (State vs. Holm, 138 Minn., 281; 164 N. W., 989), either directly or through administrative bodies endowed with power to that end (Atlantic Coast Line R. Co. vs. North Carolina Corp. Comm., 206 U. S., 1; 27 S. Ct., 585; 51 Law. ed., 933; 11 Ann. Case, 398; In Re Petition for Increase of Street Car Fares, 179 N. C., 151; 101 S. E., 619).

The philosophy inseparable from the logic of the adjudicated cases is based on the overwhelming power of regulation possessed by the state in the public interest. A finding, therefore, that the private way in question is property affected with a "public interest" leads to a recognition of the public power or regulation and no more. The fact, for instance, that the plaintiff has opened a way to the public and charges a fee or toll on motor vehicles for hire may lead the legislature or the administrative authorities to intervene and regulate and, if necessary, to determine the reasonableness of the fee charged under its rate-fixing authority.

Even as regards public utilities, courts have held with unerring uniformity that the utility itself may prescribe rules and regulations for the due and proper conduct of its business, and the protection of itself against fraud, injury or undue risk and liability, the only limitations being that said rules shall be lawful and reasonable. The utility may enforce compliance with its rules by those dealing with it and may refuse or discontinue service to one who does not conform to its rules. (See Thurston vs. Union Pacific R. Co., 4 Dill. [U. 8.], 321; 23 Fed. Cas. No. 14019; 13 Alb. L. J., 393; 8 Chic. Leg. N., 323; 22 Int. Rev. Rec., 251; Brown vs. Memphis, & C. R. Co., 5 Fed., 499; 7 Fed., 51; Gray vs. Cincinnati Southern R. Co., 11 Fed., 683; Hewlett vs. Western Union Tel Co. [C. C.], 28 Fed., 181; Bluthenthal vs. Southern Ry. Co., 84 Fed., 920; Armstrong vs. Montgomery St. Ry. Co., 123 Ala., 233; 26 So., 349; Birmingham Ry., L. & P. Co. vs. Littleton, 201 Ala., 141; 77 So., 565, 570; Weigand vs. Alabama Power Co., 177 So., 206; McCook vs. Northup, 65 Ark., 225; 45 S. W., 547; California Powder Works vs. Atlantic & P. R. Co., 113 Cal., 329; 45 Pac., 691; 36 L. R. A., 648; Southern Ry. Co. vs. Watson, 110 Ga., 681; 36 S. E., 209; Southern Ry. Co. vs. Howard, 111 Ga., 842; 36 S. E., 213; Macon, etc. Ry. Co. vs. Johnson, 28 Ga., 409; Coyle vs. Southern Ry. Co., 112 Ga., 121; 37 S. E., 163; Central of Georgia Ry. Co. vs. Motes, 117 Ga., 923; 43 S. E., 990; 62 L. R. A., 507; 97 Am. St. Rep., 223; Southern Ry. Co. vs. Bailey, 143 Ga., 610; 85 S. E., 847, 848; L. R. A. [1915E], 1043; Railroad Commn. vs. Louisville, etc., R. Co., 140 Ga., 817; 80 S. E., 327; L. R. A. [1915E], 902; Ann. Cas. [1915A], 1018; Huston vs. City Gas. etc., Co., 158 HI. App., 307; Chicago, etc., R. Co. vs. Williams, 55 Ill., 185; 8 Am. Rep., 641; Milwaukee Malt Extract Co. vs. Chicago, etc., R. Co., 73 Iowa, 98; 34 N. W., 761; Gregory vs. Chicago, etc. R. Co., 100 Iowa, 345; 69 N. W., 532; Pittsburg, etc., R. Co. vs. Vandyne, 57 Ind., 576; 26 Am. Rep., 68; Louisville, etc., R. Co. vs. Wright, 18 Ind. App., 125; 147 N. E., 491; Cox vs. City of Cynthiana, 123 Ky., 363; 96 S. W., 456; 29 Ky. L., 780; Louisville Tobacco Warehouse Co. vs. Louisville Water Co., 162 Ky., 478; 172 S. W., 928; McDaniel vs. Faubush Tel. Co., 106 S. W., 825; 32 Ky. L., 572; Day vs. Owen, 5 Mich., 520; 72 Am. Dec., 62; Faber vs. Chicago Great Western R. Co., 62 Minn., 433; 64 N. W., 918; 36 L. R. A., 789; Daniel vs. North Jersey St. Ry. Co., 64 N. J. L., 603; 46 Atl., 625; State vs. Water Supply Co. of Albuquerque, 19 N. W., 36; 140 P., 1059, 1060; L. R. A. [1915A], 246; Ann. Cas. [1916E], 1290; People vs. Babcock, 16 Hun. [N. Y.], 313; Freedon vs. New York Cent., etc., R. Co., 24 N. Y. App. Div., 306; 48 N. Y. Sttp., 584; Montgomery vs. Buffalo Ry. Co., 24 N. Y. App. Div., 454; 48 N. Y. Sup., 849; Dowd vs. Albany Ry. Co., 47 N. Y. App. Div., 202; 62 N. Y. Sup., 179; Peck vs. N. Y. Cent., etc., R. Co., 70 N. Y., 587; Texas,

etc., *R. Co. vs. Johnson*, 2 Tex. App. Civ. Cas., sec. 185; *Guthrie Gas. Co. vs. Board of Education*, 64 Okl., 157; 166 P., 128; L. R. A. [1918D], 900; *Henderson Coal Co. vs. Public Serv. Commn.*, 73 Pa. Super., 45; *McMillan vs. Federal St., etc., Ry. Co.*, 172 Pa. St., 523; 33 Atl., 560; *State vs. Goss*, 59 Vt, 266; 9 Atl., 829; 59 Am. Rep., 706; *Stevenson vs. West Seattle Land, etc., Co.*, 22 Wash., 84; 60 Pac., 51; *Chicago, etc., Ry. Co. vs. Williams*, 55 111., 185; 8 Am. Rep., 641.) That a corporation engaged in business affected with "public interest" may prescribe reasonable rules and charges for conducting its business is well settled. (*McDaniel vs. Faubush Telephone Co.*, supra.) This is a right which exists independently of any statutory enactment (*Weigand vs. Alabama Power Co.*, supra).

That persons engaged in business clothed with a "public interest" may make reasonable discriminations may, furthermore, be illustrated by taking innkeepers as an example. The keeper of an inn may make reasonable and proper rules governing the conduct of his business (14 R. C. L., p. 502). In so doing, he may refuse to receive as guests those who do not come in a situation in which they are fit to be received (*Bonner vs. Welborn*, 7 Ga., 296, 334, 337; *Bowlin vs. Lyon*, 67 Ia., 536; 25 N. W., 766; 56 Am. Rep., 355; *Markham vs. Brown*, 8 N. H., 523; 31 Am. Dec, 209; *State vs. Steele*, 106 N. C, 766; 11 S. E., 478; 19 A. S. R., 573; 8 L. R. A., 516; *Pidgeon vs. Legge*, 5 Week. Rep., 649). He may, therefore, admit to his inn only persons of good character and well demeaned (*Clemons vs. Meadows*, 123 Ky., 178; 94 S. W., 13; 124 A. S. R., 339; 6 L. R. A. [N. SJ, 847; *Atwater vs. Sawyer*, 76 Me., 539; 49 Am. Rep., 634), and those who are free from any contagious or infectious disease (*Jackson vs. Virginia Hot Springs Co.*, 213 Fed., 969). A person who is disorderly or is of suspicious, immoral or objectionable character may be refused admission by the innkeeper (*Markham vs. Brown*, supra; *Goodenow vs. Travis*, 3 Johns., 427; *Holden vs. Carraher*, 195 Mass., 392; 81 N. E., 261; 11 Ann. Cas., 724; *State vs. Steele*, supra; *McHugh vs. Schlosser*, 159 Pa. St., 480; 28 Atl., 291; 39 A. S. R., 699; 23 L. R. A., 574; *Nelson vs. Bodt*, 180 Fed., 779; *Watkins vs. Cope*, 84 N. J. L., 143; 86 Atl., 545; *Fraser vs. McGibbon*, 10 Ont. Week. Rep., 54; *Howell vs. Jackson*, 6 Car. & P., 723; *Rex vs. Ivens*, 7 Car. & P., 213; *Thompson vs. McKenzie*, 1 K. B., 905; 77 L. J. K. B. N. S., 605; 98 L. T. N. S., 896; 24 Times L. Rep., 330; 72 J. P., 150; 52 Sol. Jo., 302; *Goodenow vs. Travis*, 3 Johns., 427). And a person who, once inside the inn, does not demean properly may be refused further service and may be ejected, by force, if necessary (*Lehnan vs. Hines*, 88 Kan., 58; 127 Pac., 612; 42 L. R. A. [N. SJ, 830 and note; *Holden vs. Carraher*, 195 Mass., 392; 81 N. E., 261; 11 Ann. Cas., 724 and note; *De Wolf vs. Ford*, 193 N. Y., 397; 86 N. E., 527; 127 A. S. R., 969; 21 L. R. A. [N. SJ, 860; *State vs. Steele*, supra; *McHugh vs. Scholsser*, supra; *Chase vs. Knabel*, 46 Wash., 484; 90 Pac, 642; 12 L. R. A. [N. SJ, 1155; 2 British Rul. Cas., 692). Even the exclusion of patrons on account of the race to which they belong has been sustained improperly, I believe, on the ground that they are objectionable to other patrons and injure thereby the business of the innkeeper (*State vs. Steele*, supra). And it has been held that a prize fighter who had broken the laws of various states (*Nelson vs. Boldt*, 180 Fed., 779; *Watkins vs. Cope*, supra), or a card sharp (*Watkins vs. Cope*, supra), or a person who has the habit of visiting inns with big dogs which were an annoyance to the guests and a nuisance to the inn-keeper (*Reg. vs. Rymer*, L. R. 2 Q. B. Div., 136; 46 L. J. Mag. Cas. N. S., 108; 25 Week. Rep., 415; 13 Cox, C. C, 378; 35 L. T. N. S., 774) may be refused admission.

In the case at bar, it is not seriously contended that the plaintiff, by opening the road in question, has become a public utility. In this jurisdiction, the term "public utility" has a technical meaning and refers to the enterprises mentioned in section 13 of Act No. 3108, as amended by Act No. 4033. This is admitted in the foregoing opinion. The difficulty arises because "public utility" is confused with "public interest."

III. The foregoing opinion, by denying the right of the owner of the private way to impose what I consider is a reasonable limitation upon the use of Us property, undermines the right of ownership and its incidents.

Briefly stated, the case is this: Plaintiff is the owner of a sugar central and the premises on which it is located in

Manapla, Occidental Negros. Realizing the necessity of constructing a private way through its property for its own convenience and the convenience of persons who may have dealings with it, it did open one to connect its property with the provincial road. The way is about a kilometer in length and terminates at the mill site of the hacienda. It was built at the expense of the owner, without any contribution from anyone. It is repaired, maintained and kept at the expense of the same owner. It is guarded by a gate keeper employed and paid by the owner itself. It was opened not at the behest of any public demand or necessity but primarily for the sole convenience of the owner. The defendant, Serafin Hidalgo, is the keeper of a tienda situated in a contiguous hacienda belonging to Luciano Aguirre. The tienda is located almost on the borderline of the hacienda of the plaintiff. Hidalgo in this store sells and otherwise dispenses tuba which intoxicates the laborers of the plaintiff, incapacitates them for work and breaks their morale. The damage to the plaintiff is positive and real. It is not mere "bare possibility" as stated in the foregoing opinion. Upon these facts, the foregoing opinion holds that the defendant can not be prohibited by the plaintiff from using the latter's private way. I hold otherwise. I believe that the plaintiff may prohibit the defendant from using its private property. Stated otherwise, the use by Hidalgo of the private way of the plaintiff may be conditioned upon his not carrying tuba. Plaintiff may not, to be sure, prevent the sale of tuba outside the limits of its property. This is not pretended in this case. But because plaintiff may not prohibit dispensation by the defendant of the intoxicating beverage outside of its property, does it follow that it is in duty bound to offer facility to the defendant for the sale of tuba and the consequent intoxication of its laborers? Is it under any obligation, moral or legal, to do this? In other words, can plaintiff be compelled to contribute, directly or indirectly, to the infliction upon itself of an admittedly real and positive damage and provide the means for its own destruction? To ask these questions is to answer them. That you may, for instance, hang a man because you have the physical or legal power to do so is conceivable, but that you may not only hang him but also compel him to hang himself is only possible among barbarians. Such a result is not possible even under the "Declaration of Rights of the Laboring and Exploited People by the Third All-Russian Congress of Soviets of Workers', Soldiers' and Peasants' Deputies." Let me observe that social and economic equilibrium should be maintained by striking the proper balance. One extreme is as vicious and dangerous as the other. There is as much danger of destruction from the devastating winds blowing from the Caucasus and the Ural mountains as from the infectious and hallowed breath originating from the castles of the staggering feudal lords of Europe. Social storm is produced one way or the other.

The inviolability of private property dates as far back as the days long past when primitive society employed force to protect its collective ownership. Upon the change of the proprietary tenure from collectivism to individualism, consequent upon the growth of the Roman concept of property, private force was substituted by state authority as the sanctioning power of ownership. Later evolution of civil society manifested the growth of state power. The Philippines finds herself engulfed in the vortex of this modern trend of greater state control of private property. Our Constitution, for instance, expressly authorizes the National Assembly to determine by law the size of private agricultural land which individuals, corporations and associations may acquire and hold, subject only to rights existing prior to the enactment of such law (Art. XII, sec. 3). It also provides that the State, upon payment of just compensation, may transfer to public ownership utilities and other private enterprises to be operated by the Government (Art. XII, sec. 1). And it permits the National Assembly to authorize, upon payment of just compensation, the expropriation of lands to be subdivided into small lots and conveyed at cost to individuals (Art. XII, sec. 4). This latter provision constitutes an extension of the power of eminent domain. The settled principle is that private property shall be taken only for public use (*Visayan Refining Co. vs. Camus and Paredes*, 40 Phil., 550; *People ex rel. Detroit & H. R. Co. vs. Salem*, 20 Mich., 452; 4 Am. Rep., 500). A provision to this effect is found in the Bill of Rights of our Constitution (Art. III, sec. 1, par. 2. See also Ordinance appended to the Constitution, sec. 1, par. 12; Civil Code, art. 349; Code of Civil Procedure, sec 241; Adm. Code, sec. 2245.) Similar provisions are to be found in the Fifth Amendment to the Constitution of the United States and in the

constitutions of the great majority of the states of the Union. Some state constitutions even go to the extent of expressly prohibiting the taking of property for private use (Alabama [1901], I, 23; Arizona [1912], II, 17; Colorado [1876], II, 14, 15; Georgia [1877] I, iii, par. I; Missouri [1875], II, 20; Washington [1889], I, 16; Wyoming [1889], I, 32, 33). But whilst innovations have been introduced to enlarge the control by the public power of private property, the Filipino philosophy of the inviolability of property right has tarried unaltered behind the thin veneer of our Constitution. By providing in the Bill of Rights that no person shall be deprived of property without due process of law, that private property shall not be taken for public use without just compensation, that the people shall be secure in their possessions against unreasonable searches and seizures, that no law impairing the obligation of contracts shall be passed, the Filipino people, for their own protection, stamped upon the right of private ownership an inviolability—a deep and sacred impress—which can not be easily wiped out or frittered away until it is no more. The protection of private right, it seems to me, is a reflection of our inherent temperament as a people, and albeit fundamental principles must be construed in the light of changing conditions and circumstances, the fabric with which our social and political organizations have been wrought or woven into a lasting whole, has remained unaltered. And not even the principle of social justice, vital and salutary as it is, can be invoked to annihilate property rights.

Restrictions upon the paramount property right lodged in the private individual arise only from the superior right of the state, the legal rights of third persons and the general duties resting upon the owner as a law-abiding citizen. In the language of Chief Justice Shaw in *Commonwealth vs. Alger* (7 Cush. [Mass.], 53), "We think it as a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide-waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." (See also *Mugler vs. Kansas*, 123 U. S., 623; 8 Sup. Ct., 273; 31 Law. ed., 205.)

IV. From what has been said, it does not, however, follow that plaintiff is entitled to the equitable remedy of injunction. In the first place, the plaintiff styled the relief it is seeking as an "Accion Negatoria" which, under the old Spanish procedural law and under the Roman law, consisted in the right of a landowner to defend the free dominion of his tenement. This action which had specific application to servitudes has, however, been repealed by the Code of Civil Procedure now in force. The right of the plaintiff should, consequently, be tested by the rules governing the issuance of the new remedy of injunction. The circumstances under which, in accordance with the former procedural law, the action negatoria could properly issue, would not necessarily justify the issuance of an injunction, as defined and provided in the new Code (as to the other Spanish *interdictos de adquirir, de retener and de recobrar or de despojo*, see *Devesa vs. Arbes*, 13 Phil., 273, 279; *Liongson vs. Martinez*, 36 Phil., 948, 952). In the second place, injunction, being an equitable remedy, the granting thereof is dependent upon the sound discretion of the court (32 C. J., pp. 29-33; 14 R. C. L., pp. 307, 308). It is only in clear cases of abuse of discretion on the part of the trial judge that review on appeal should be made (32 C. J., p. 33). "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting

preventive process of injunction." (Bonaparte vs. Camden, etc., R. Co., 3 Fed. Cas. No. 1617; Baldw., 205, 217.) In the third place, the remedy sought here is not against the transportation of tuba by the defendant through the premises of the plaintiff, but the entire exclusion therefrom of the defendant regardless of whether he carries tuba or not. In the fourth place, the revocation of the judgment of the court below would exclude the defendant alone from the use of the private way while the general public will be permitted to do so. The defendant would be excluded not only from the use of the private premises of the plaintiff, but also from the way left open to the public, regardless of whether he is carrying tuba or not. The result being clearly unjust, the extraordinary legal remedy of injunction should not be granted. (Truly vs. Wanzer, 5 How., 141; 12 Law. ed., 88; Irwin vs. Dixon, 9 How., 11; 13 Law. ed., 25; Sands vs. Marburg, 36 Ga., 534; 91 Am. Dec. 781; Beidenkopf vs. Des Moines Life Ins. Co., 160 Ia., 629; 142 N. W., 434; 46 L. R. A. [N. S.], 290; Edwards vs. Alluey Min. Co., 38 Mich., 46; 31 Am. Rep., 301; Troy, etc., R. Co. vs. Boston, etc., Ry. Co., 86 N. Y., 107; Eastman Kodak Co. vs. Warren, 108 Misc., 680; 178 N. Y. S., 14 [reversed on other grounds, 189 App. Div., 556; 179 N. Y. S., 325; Farmer vs. St. Paul, 65 Minn., 176; 67 N. W., 990; 33 L. R. A., 199]; Marvel vs. Jonah, 81 N. J. Eq., 369; 86 A., 968 [reversed on other grounds, 83 N. J. Eq., 295; 90 A., 1004, L. R. A. (1915B), 206; Rogers vs. O'Brien, 153 N. Y., 357; 47 N. E., 456; Wendell vs. Conduit Mach. Co., 74 Misc., 201; 133 N. Y. S., 758; Higgins vs. Higgins, 57 N. H., 224; Atchinson etc., Ry. Co. vs. Meyer, 62 Kan., 696; 64 P., 597; Cincinnati, etc. R. Co. vs. Miami, etc. Transp. Co., 1 Oh. Cir. Ct. (N. S.), 117; Ardmore vs. Fraley, 65 Okl., 14; 162 P., 211; Heilman vs. Lebanon, etc., St. Ry. Co., 175 Pa., 188; 34 A., 647; Messner vs. Lykens, etc., R. Co., 13 Pa. Super., 429; Mackintyre vs. Jones, 9 Pa. Super., 543; Speese vs. Schuylkill River East Side R. Co., 10 Pa. Dist., 515].)

In closing, I cannot but condemn the action of O. P.1 Ankerson, auditor of the plaintiff company, in overturning the receptacles (balading) of tuba, which the defendant attempted to carry through the premises of the plaintiff company, in defiance of the latter's repeated prohibition. Righteous indignation at the misconduct of an employee of the plaintiff company and the damage caused the defendant, however, should not carry us beyond the merits of the present controversy. The protection of the property rights of the plaintiff is one thing and the condemnation of the acts of vandalism of an employee of the plaintiff another thing.

AVANCEÑA, C. J.:

I concur with the opinion of Justice Laurel. Diaz, J.;

I concur with the opinion of Justice Laurel.

DISSENTING

VILLA-REAL, J.:

I concur with the opinion of Justice Laurel in so far as he dissents from the opinion of Justice Recto, but I dissent from it in so far as he concurs with said opinion.

In concurring with the opinion of Justice Recto, Justice Laurel says: "In the fourth place, the revocation of the judgment of the court below would exclude the defendant alone from the use of the private way while the general public will be permitted to do so. The defendant would be excluded not only from the use of the private premises of the plaintiff, but also from the way left open to the public, regardless of whether he is carrying tuba or not. The result being clearly unjust, the extraordinary legal remedy of injunction should not be granted." The facts in this case show that said defendant was warned several times not to pass on said road when carrying tuba to the adjoining "Hacienda Sangay" where he sells it to the plaintiffs workmen who become intoxicated and unfit for work. The repeated warnings were disregarded by the defendant, until one day the auditor of the said plaintiff became so disgusted that he could not refrain from stopping his car and compelling him to unload the tuba. If the

North Negros Sugar Co., Inc., as the owner of the private road in question, has a right to regulate its use by imposing reasonable restrictions and limitations, to prohibit its use by the defendant who has repeatedly disregarded the warning of its auditor, thus becoming a persona non grata, is certainly not unjust. To force the owner of a private road to allow the use of said road by a person who has incurred his displeasure, if not his hatred, just because he allows other persons to pass through it, cannot under whatever consideration, be just. In order to avoid taking the law into its own hands in excluding the defendant who has become an undesirable person to it, the plaintiff, as a law abiding corporation, has come to the courts to seek help in the enforcement of its property rights. The opinion of Justice Laurel, concurred in by the Chief Justice and Justice Diaz, while recognizing the right of said plaintiff to regulate the use of its private road by imposing upon the users reasonable restrictions and limitations, refuses it the remedy it seeks to help it in preventing an undesirable person to use its private road, leaving to it no alternative except either to take the law into its own hands or to close the road to everybody with the exception of those who deal with it in its business.

I am, therefore, of the opinion that the writ of injunction, as an auxiliary remedy, should be granted, and the judgment of the court below should be revoked.

IMPERIAL, J.:

I concur in the foregoing dissenting opinion of Justice Villa-Real.

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